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9
10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12
13 **NAVNEET GHOTRA,**) Case No.: C07 4428 MMC
14 Petitioner,)
15 v.)
16 **MICHAEL CHERTOFF**, Secretary,)
17 Department of Homeland)
18 Security, **NANCY ALCANTAR**, Field)
19 Office Director, Immigration)
20 and Customs Enforcement, and) [Alien Registration No.:
21 **ALBERTO GONZALES**, Attorney) A77 381 997]
22 General of the United States,)
23)
24 Respondents.)
25)

26
27 Navneet Ghotra, petitioner herein, hereby respectfully
28 moves the United States District Court for an order staying the
29 detention and removal of petitioner to India pursuant to the
30 administrative order of removal issued by the Board of
31 Immigration Appeals (hereinafter BIA) on or about August 29,
32 2003 by the Department of Homeland Security, United States of
33 Immigration and Customs Enforcement, San Francisco District

1 (hereinafter DHS/ICE) by and through the San Francisco District
2 deportation unit, 630 Sansome Street, 5th Floor, San Francisco,
3 California 94111, pending disposition of the appeal of the
4 judgment and order dismissing her petition for writ of habeas
5 corpus before the United States District Court, Northern
6 District of California, issued by the Honorable Maxine M.
7 Chesney, United States District Judge, on or about October 15,
8 2007. Appeal to the United States Court of Appeals for the
9 Ninth Circuit was taken on or about October 19, 2007.

10 This application is made pursuant to Federal Rules of
11 Appellate Procedure, Rule 8(a)(1).

12 Petitioner further respectfully moves the United States
13 District Court for a temporary stay of the execution of the
14 aforementioned final order of removal by the respondents,
15 pending a ruling on the present motion. Maharaj v. Ashcroft 295
16 F3d 963, 964-6 (9th Cir. 2002).

17 Execution of the final order of removal by DHS/ICE is
18 imminent since petitioner is in the constructive custody of
19 respondents herein and removal to India is imminent since the
20 DHS/ICE is in receipt of a travel document with a reporting date
21 of November 7, 2007. Accordingly, petitioner requests that a
22 temporary order of emergency stay of execution of the final
23 order of removal pending a ruling on the motion for stay.

II

ISSUES ON APPEAL

1. The District Court, having found jurisdiction over the petition for writ of habeas corpus under Singh v. Gonzales ___ F3d ___ (9th Cir. 8/24/07, Case No. 05-16005), erred as a matter of law and fact in finding that the failure of petitioner's counsel of record in post-final administrative order review proceedings under 8 USC, Section 1252 to raise the issues of: a) ineffective assistance of prior counsel in the administrative proceedings based on his failure to consolidate petitioner's removal proceeding with that of her father's removal proceeding, who was represented by the same counsel; to timely introduce available corroborating evidence in support of petitioner's claims; and to call her father as an available corroborating witness, all of which are errors evident on the face of the record; and b) to raise an equal protection claim and failure of the BIA to apply its own regulations in the petition for review proceedings since petitioner's father was granted relief under 8 USC, Section 1231(b)(3) on a claim derivative of petitioner's claim for relief and which was raised in a "letter motion" before the Board of Immigration Appeals (hereinafter BIA), but was not thereafter raised by counsel before the Court of Appeals after the BIA failed to rule on the matter, disregarding the "letter motion" as inadmissible "additional evidence" rather

1 than a motion or, alternatively, to raise the issue of the BIA's
2 failure to reconcile the two conflicting removal decisions under
3 8 CFR, Section 1003.1(e)(6)(i) before the Court of Appeals, does
4 not constitute ineffective assistance of counsel after entry of
5 a final administrative order of removal reviewable in habeas
6 corpus proceedings under Singh. Singh, at 10473-4, 10486-8;
7 Castillo-Perez v. INS 212 F3d 518, 524-8 (9th cir. 2000); Escobar
8 Grijalva v. INS 2006 F3d 1331, 1334-5 (9th Cir. 2000); Njunga v.
9 Ashcroft 374 F3d 765, 771 n.4 (9th Cir. 2004); Wong v. Ashcroft
10 341 F3d 1015, 1019, n.2 (9th Cir. 2003); 8 CFR, Section
11 1003.1(e)(6)(i); Romiero de Silva v. Smith 773 F2d 1021, 1025
12 (9th Cir. 1985).

13 2. The loss of the right to review of the foregoing
14 constitutional, statutory and regulatory issues under 8 USC,
15 Section 1252(b)(1) violates the due process clause of the Fifth
16 Amendment under Singh, with the appropriate remedy being a
17 remand to the BIA to address the issue of the two unreconciled
18 conflicting decision and orders of the BIA, a remedy which does
19 not require review of a final order of removal. Singh at 10473-
20 4; 10486-8.

22 The error and omission herein occurred after entry of the
23 final administrative order by the BIA on August 29, 2003 and
24 does not require review of the final order itself. Accordingly,
25

1 the District Court has jurisdiction under Singh as the District
2 Court correctly found.
3

4 **III**

5 **BASIS FOR STAY MOTION**

6 The basis for this motion is as follows:
7

8 Petitioner incorporates by reference her Petition for Writ
9 of *Habeas Corpus* or, In the Alternative, Order to Show Cause,
10 and the attached exhibits, in support of the factual basis for
11 this motion set forth below.

12 1. Petitioner is a citizen and national of India who was
13 born on or about January 17, 1978, at Talwandi Salhan, Punjab,
14 India, and who has been present in the United States of America
15 since August 30, 1998 when she was admitted under an H-4 non-
16 immigrant visa. She is married by religious ceremony only to
17 Rajinder Pal Singh, also an Indian citizen and national. The
18 couple has two minor United States citizen children, Carol
19 Singh, age 6, and Kevin Tej Singh, age 8 months. Petitioner and
20 her family reside in Bakersfield, California, where they own
21 their own residence and petitioner's spouse owns and operates
22 two tobacco stores.

23 2. Petitioner is the daughter of Kulwinder Singh, who was
24 originally admitted to the United States under a non-immigrant H-
25 1-B visa and is now a lawful permanent resident alien.

1 3. Petitioner herself was admitted as an H-4 dependent non-
2 immigrant of her father at San Francisco, California on or about
3 August 30, 1998. She applied for political asylum before the
4 Asylum Office of the San Francisco District of the former
5 Immigration and Naturalization Service (hereinafter AO/INS).

6 4. On or about November 13, 1998 the AO/INS referred the
7 application to the Office of the Immigration Judge, San Francisco,
8 California (hereinafter OIJ/SF) and a notice to appear
9 (hereinafter NTA) was issued.

10 5. After Hardeep Rai, of Rai and Associates, entered an
11 appearance on behalf of petitioner before the OIJ/SF on or about
12 May 18, 1999, a motion to change venue to the Office of the
13 Immigration Judge, Los Angeles, California (hereinafter OIJ/LA)
14 was filed and thereafter granted on or about July 10, 1999 since
15 petitioner moved to the Los Angeles District.

16 6. On or about July 21, 1999, Ronald Peake, an attorney
17 at law, entered an appearance on behalf of petitioner before the
18 OIJ/LA. Mr. Peake subsequently entered an appearance on behalf
19 of Kulwinder Singh, petitioner's father, before the OIJ/LA and
20 prosecuted his application for political asylum and withholding
21 of removal under 8 USC, Section 1158 and 1231(b)(3) and Article
22 3 of the United Nations Convention Against Torture and Other
23 Cruel, Inhuman or Degrading Treatment or Punishment, as ratified
24 (hereinafter UNCAT) in Matter of Kulwinder Singh, Case No. A71

1 484 844 on claims derivative of petitioner's and based on a
2 common nucleus of facts. Based on information and belief, Peake
3 never moved to consolidate the actions before the OIJ/LA.

4 7. After the granting of one continuance for the receipt
5 of documents from India and the denial of a second continuance,
6 hearing on petitioner's application for relief under 8 USC,
7 Section 1158 and 1231(b)(3) and UNCAT was held on or about
8 November 19, 2001 before the Honorable Charles A. Del Bene,
9 immigration judge, OIJ/LA. Peake sought admission of primary
10 documents in support of petitioner's claims, which he received
11 from petitioner in time for a timely filing but which were
12 inexplicably filed late by Peake and then withdrawn without
13 argument when asked by the immigration judge to explain the
14 late submission. Despite the presence at time of hearing of
15 petitioner's father and an unidentified uncle as precipitant
16 witnesses, Peake declined to call them to testify. Petitioner
17 was thus the sole witness called to testify in the proceeding
18 and the application was supported by a copy of her passport, but
19 no other documents as a result of her then counsel's failure to
20 timely submit documentation. At the conclusion of the hearing,
21 the immigration judge denied the applications based on an
22 adverse credibility finding and removal to India was ordered.

23 8. Thereafter, a hearing was held on the merits of
24 petitioner's father's application for relief under 8 USC,

1 Sections 1158 and 1231(b)(3) and UNCAT before the Honorable
2 Darlene R. Seligman, immigration judge, OIJ/LA, on or about
3 April 23, 2002, in which Kulwinder Singh was also represented by
4 Peake. Relief was granted Kulwinder Singh under 8 USC, Section
5 1231(b)(3), which is a matter of law, not discretion, based on
6 the same nucleus of facts in petitioner's claims.
7 Administrative appeal was waived by DHS.

8 9. A timely notice of administrative appeal to the BIA
9 was filed on behalf of petitioner on or about December 17, 2001
10 by Rai and Associates, who reentered an appearance for the
11 administrative appeal. Rai and Associates filed a brief on or
12 about July 1, 2002, arguing issues of credibility only, with no
13 reference to ineffective assistance of counsel by Peake.
14 Thereafter, Rai and Associates filed a letter with a copy of the
15 decision and order of the immigration judge in Kulwinder Singh's
16 removal proceeding along with a notarized affidavit from
17 Kulwinder Singh, stating that there was, in essence, a common
18 factual basis for his daughter's and his claims and noting the
19 two different results before the two different immigration
20 judges. Rai and Associates thereafter filed a document entitled
21 "reform regulation brief" with the BIA on or about September 26,
22 2002 requesting a three judge panel in which it was noted in
23 passing that a three panel is necessary to resolve conflicting
24 decisions of different immigration judges, without any reference
25

1 to the aforementioned documents regarding petitioner's father's
2 case. At all times mentioned herein, respondent Gonzales'
3 regulations set forth procedures to resolve conflicting
4 immigration judge decisions under 8 CFR, Section
5 1003.1(e)(6)(i).

6 10. On or about August 29, 2003 the BIA issued a final
7 administrative order dismissing the administrative appeal. In a
8 footnote, the BIA apparently referred to and characterized the
9 letter regarding Matter of Kulwinder Singh, A71 484 844, as
10 "additional evidence" and cited a "standard rule" that the BIA's
11 review is restricted to the record before the OIJ.

12 11. Thereafter, Rai and Associates filed a petition for
13 review with the United States Court of Appeals for the Ninth
14 Circuit (hereinafter Court of Appeals) in Ghotra v. Ashcroft,
15 Case No. 03-73515 on or about September 26, 2003.

16 12. On or about April 19, 2004, Rai and Associates,
17 through George Heridis, an attorney at law, filed a brief in
18 Case No. 03-73515. In essence, the brief argued credibility
19 issues, but failed to raise the issue of the unaddressed
20 "motion/reform regulation brief" as to the conflicting decision
21 in Matter of Kulwinder Singh, A71 484 844. Based on information
22 and belief, at no time did Hardeep Rai, George Heridis or any
23 other attorney of Rai and Associates purporting to represent
24 petitioner in the federal review proceeding raise the issue of

1 the failure of the BIA to address the conflict between the
2 aforementioned case and petitioner's case before the
3 administrative agency of respondent Gonzales despite raising the
4 issue before the BIA.

5 13. Based on information and belief, on or about December
6 15, 2004 the Court of Appeals denied the petition for review and
7 the mandate issued on or about March 9, 2005 after a petition
8 for panel rehearing was denied.

9 14. On or about April 18, 2007 respondent Nancy Alcantar
10 and her delegates of DHS/ICE detained petitioner in Bakersfield,
11 California and then released her subject to an order of
12 supervision pending execution of the removal order. At no time
13 prior to her detention on or about April 18, 2007 had petitioner
14 received notice of the dismissal of her appeal and the issuance
15 of the mandate by the Court of Appeals from Rai and Associates,
16 from the respondents and their delegates, or from any other
17 source.

18 15. On the same date of her detention, petitioner's
19 spouse, Rajinder Pal Singh, was also detained by respondent
20 Alcantar and incarcerated at the Santa Clara County Jail. After
21 the filing of a habeas corpus petition in Rajinder Pal Singh v.
22 Chertoff, et. al. United States District Court, Northern
23 District of California, Case No. C07-3943 MMC, Rajinder Pal
24 Singh was released on bond on or about August 17, 2007 by DHS

1 upon entry of a stipulation for abeyance. In the interim, the
2 family financial situation was adversely affected since
3 petitioner's husband was unable to manage his two tobacco
4 stores, the primary source of the family income.

5 16. Based on information and belief, at no time in the
6 Court of Appeals proceeding did the attorneys of Rai and
7 Associates representing petitioner raise the issue of
8 ineffective assistance of counsel by Peake in failing to timely
9 file and offer into evidence the corroborating evidence, or to
10 call Kulwinder Singh as a witness at time of hearing, or to move
11 to consolidate petitioner's proceeding with Matter of Kulwinder
12 Singh, A71 484 844, before the OIJ/LA.

13 17. Based on information and belief, at no time in the
14 Court of Appeals proceeding did the attorneys of Rai and
15 Associates representing petitioner raise the violation of the
16 equal protection component of the due process clause inherent in
17 the conflicting immigration judge decisions in petitioner's
18 administrative proceeding and Matter of Kulwinder Singh A71 484
19 844 or the failure of the BIA to address the issue raised by Rai
20 and Associates in the administrative appeal on review.

22 18. At all times mentioned herein petitioner had a right
23 to effective assistance of counsel secured by the due process
24 clause of the Fifth Amendment to the federal constitution,
25 including proceedings after issuance of a final administrative

1 order of removal. Singh, at 10473-4; 10486-8; Dearinger ex.
2 Rel. Volkova v. Reno 232 F3d 1042, 1045-6 (9th Cir. 2000).

3 19. At all times mentioned herein, it was and is a
4 violation of the equal protection component of the due process
5 clause to render different decisions between similarly situated
6 aliens in separate proceedings involving a common nucleus of
7 facts. Njuguna v. Ashcroft 374 F3d 765, 771, n.4 (9th Cir.
8 2004); Wang v. Ashcroft 341 F3d 1015, 1019, n.2 (9th Cir. 2003).
9 At all times mentioned herein, petitioner was entitled to the
10 protection of the equal protection component of the due process
11 clause and of the due process clause itself as an alien in
12 removal proceedings. Zadrydas v. Davis 533 US 678, 692-3
13 (2001); Plyler v. Doe 457 US 202, 212 (1982); Accardi v.
14 Shaughnessy 347 US 260 (1954).

15 20. At all times mentioned herein, the relief sought under
16 8 USC, Section 1231(b)(3) is mandatory, and not discretionary
17 under respondent Gonzales' administrative decisions. Matter of
18 Lam 18 I&ND 15 (BIA 1981). Accordingly, a liberty interest is
19 implicated by the disparity in the two administrative decisions.
20 INS v. St. Cyr 533 US 289, 307-8 (2001).

21 21. On or about August 27, 2007 petitioner filed her
22 petitioner for writ of habeas corpus or, in the alternative,
23 order to show cause (hereinafter petition) with the United
24 States District Court, Northern District of California.

22. After briefing, the District Court vacated an October 12, 2007 hearing date, issued a decision denying the petition on or about October 12, 2007 and entered judgment on or about October 15, 2007.

23. Notice of appeal to the United States of Appeals for the Ninth Circuit was filed on or about October 19, 2007.

V

STANDARDS FOR STAY

Under the holding in Maharaj v. Ashcroft 295 F3d 963, 964-6 (9th Cir. 2002) and Abassi v. INS 143 F3d 513, 514 (9th Cir. 1998) petitioner respectfully submits that she is likely to prevail on the merits or, alternatively the issues herein are serious legal questions and the balance of hardships favor petitioners in that:

As to the violations of the due process clause of the Fifth Amendment, and the equal protection component thereof, petitioner has experienced prejudice since:

a. The violation is a clear, unequivocal error of law;

b. Petitioner is the mother of two minor United States citizen children.

c. Petitioner is the spouse of a homeowner, subject to a mortgage

d. Petitioner will be barred from reentry for at least five years if removed. 8 USC Section 1182(a)(9)(A)(i).

1 e. Petitioner and her husband, also before this court in an
2 appeal proceeding, are deemed vital to the continued cooperation
3 of a citizen informant in an ongoing, unrelated investigation by
4 the California Department of Justice and the United States Bureau
5 of Alcohol, Tobacco and Firearms.

6 f. Petitioner will be precluded from presenting further
7 evidence in support of her application for relief under 8 USC,
8 Section 1231(b)(3) on remand if removed.

9 If removed, petitioner will be separated from her family,
10 unable to support them and will be barred from seeking further
11 relief despite the constitutional and statutory deprivations
12 herein.

13 VI
14

15 **IMMINENT REMOVAL PENDING**

16 Petitioner is in the constructive custody of respondents and
17 is subject to removal from the United States of America to India
18 at any time by the Department of Homeland Security, Bureau of
19 Immigration and Customs Enforcement, by and through 630 Sansome
20 Street, Room 548, San Francisco, California 94111, with a report
21 date of November 7, 2007. On or about October 29, 2007 a copy of
22 this application was served on the United States Attorney Office,
23 Northern District of California, at 450 Golden Gate Avenue, 9th
24 Floor, San Francisco, California by e-filing.

1 WHEREFORE, petitioner respectfully prays that the United
2 States District Court issue an order:

3 1. Temporarily staying the execution of the administrative
4 order of removal set forth herein by the Immigration and Customs
5 Enforcement, Department of Homeland Security pending disposition
6 of this motion for stay.

7 2. Staying the detention of petitioner by respondents
8 pending disposition of this motion for stay.

9 3. Staying execution of the final order of removal set
10 forth herein pending disposition of the appeal herein; and

11 4. Granting other such relief as the Court deems just and
12 proper.

13
14 Dated: October 29, 2007

15 JAMES TODD BENNETT
16 Attorney for Petitioner
17 NAVNEET GHOTRA